85-1018

No._____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

SOUTHLAND NEWS CO., INC.
a Kentucky corporation,

Petitioner,

v.

THE COUNTY OF WINNEBAGO, a body politic,and
PAUL GILL, in his capacity as Clerk of
Winnebago County, Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the decision of the United States Supreme Court dismissing Starview Drive-in Theatre, Inc. v. Cook County, et al., 475 U.S. 1113 (1982), for want of a substantial federal question, was, under Hicks v. Miranda, 422 U.S. 332 (1975), dispositive of the issues in this case.

TABLE OF CONTENTS

Subject Index

	Pages
Statement of the Case.....	2
Argument	3 - 9
Conclusion.....	10

TABLE OF AUTHORITIES

Cases

	Pages
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).....	3, 4
Young v. American Mini Theatres, Inc., 427 U.S. 40 (1976)	5, 6
Starview Drive-in Theatre, Inc. v. Cook County, et al., 457 U.S. 1113 (1982).....	6, 7, 8, 9
Hicks v. Miranda, 422 U.S. 332 (1975).....	7
Mandel v. Bradley, 432 U.S. 173 (1977).....	7, 8
People Ex Rel. Carey v. Starview Drive-in Theatre, Inc., 100 Ill. App. 3d 624, 427 N.E.2d 201 (1981), appeal dismissed for want of a substantial federal question, Starview Drive-in Theatre, Inc. v. Cook County, et al., 457 U.S. 1113 (1982).....	8, 9

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Respondents respectfully pray that the Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 15, 1985 be denied.

STATEMENT OF THE CASE

The facts of the case are stated fully in the statement of the case set forth in the Petition for Writ of Certiorari.

ARGUMENT

THE LOWER FEDERAL COURTS PROPERLY AFFORDED CONTROLLING PRECEDENTIAL WEIGHT TO SUMMARY DISMISSAL OF AN APPEAL FROM AN ILLINOIS APPELLATE COURT DECISION, THEREBY UPHOLDING THE CONSTITUTIONALITY OF THE WINNEBAGO COUNTY AMENDED OUTDOOR THEATRE LICENSE ORDINANCE

The Petitioner has consistently misconstrued the Respondents' amended Outdoor Theatre License Ordinance as an attempt by Winnebago County to censor the motion picture films Petitioner may seek to exhibit at its theatres.

The Respondents submit that the amended Outdoor Theatre License Ordinance is a valid exercise by Winnebago County, of its police powers in regulating outdoor theatres.

The Petitioner's reliance on Erznoznik v. City

of Jacksonville, 422 U.S. 205 (1975) is erroneous, if anything, the reasoning of this Court in Erznoznik, in reaching its decision, upholds the constitutionality of the amended Ordinance.

This Court in Erznoznik recognized that a regulation of the type challenged by the Petitioner may be constitutional. While the Court held that "the limited privacy interest of persons on the public streets (emphasis added) cannot justify [the] censorship of otherwise protected speech on the basis of content," 422 U.S. at 212, it also recognized at footnote nine of Justice Powell's opinion, that an ordinance could be drawn so as to protect the privacy of people in their homes or who are otherwise unable to avert the exposure to intrusions from exhibitions at outdoor theatres. 422 U.S. at 209, 212.

It is the Petitioner's contention that the

Winnebago County amended Outdoor Theatre License Ordinance prohibits the Petitioner from exhibiting films which may be categorized as protected speech. A fair reading of the amended Ordinance, however, clearly indicates that the Petitioner may exhibit any motion picture, so long as those of the type described in the Ordinance, cannot be seen in private homes or on public walkways. (Pet. App. pg. 15).

In Young v. American Mini Theatres, Inc., 427 U.S. 40 (1976), this Court upheld the validity of a Detroit ordinance regulating the location of "adult theatres." In so doing, this Court recognized that while such a regulation may make it more difficult for the theatre owners to exhibit sexually explicit motion pictures, it did not prohibit their exhibition. The hardship to the theatre owners in Young, that was the result of a valid ordinance

regulating adult entertainment, is similar, if not identical, to that complained of by the Petitioner in this instant case. While the Petitioner characterizes the amended Outdoor Theatre License Ordinance as a prohibition against certain films, the effect of the amended ordinance is to, at worst, make it more difficult for Petitioner to exhibit these films, a practice this Court has, under certain circumstances, found to pass constitutional muster. 427 U.S. at 62 - 63.

The constitutionality of the amended Outdoor Theatre Ordinance has already been passed upon by this Court in Starview Drive-in Theatre, Inc. v. Cook County, et al., 457 U.S. 1113 (1982), where this Court dismissed the appeal, for lack of a substantial federal question, taken from the First District Appellate Court of the State of Illinois, which had affirmed as constitutional, an outdoor

theatre license ordinance almost identical to the one challenged by the Petitioner in this case.

This Court has previously addressed the issue regarding the handling of its appellate jurisdiction by decisions involving summary action. In Hicks v. Miranda, 422 U.S. 332 (1975), this Court held that lower courts were bound by summary decisions of this Court. The precedential value of this Court's summary action was further clarified in Mandel v. Bradley, 432 U.S. 173 (1977) when this Court held, "[T]he precedential significance of summary action . . . is to be assessed in the light of all the facts in that case; . . . ." 432 U.S. at 177.

The Petitioner contends that the lower federal courts erroneously offered precedential weight of the Court's summary dismissal in Starview Drive-in Theatr Inc. v. Cook County, et al., 457 U.S. 1113 (1982). In so doing, the Petitioner (at pages 13 and 14 of it

petition) attempts to distinguish the facts in Starview from those at issue in this case, thus invoking this Court's ruling in Mandel v. Bradley, and implying that the lower federal courts failed to assess the Court's summary action in Starview in light of all the facts in that case.

A reading of Judge Roszkowski's opinion (Pet. App. pg. 4) and, the unpublished opinion of the Seventh Circuit Court of Appeals (Pet. App. pg. 1) which adopted Judge Roszkowski's opinion in its entirety, clearly shows that the lower federal courts were aware of the facts in Starview, and correctly found the distinction to be inmaterial. (Pet. App. pg. 10).

The First District Appellate Court of the State of Illinois, in People Ex Rel. v. Carey v. Starview Drive-in Theatre, Inc., 100 Ill. App. 3d 624, 427

N.E.2d 201 (1981), appeal dismissed for want of a substantial federal question, 457 U.S. 1113 (1982), upheld the constitutionality of an outdoor theatre license ordinance that was the model for the Winnebago County amended Outdoor Theatre License Ordinance. The lower federal courts properly offered precedential weight to this Court's summary dismissal in Starview Drive-in Theatre, Inc. v. Cook County, as it was a decision on the merits affirming the decision of the First District Appellate Court.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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February, 1986